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IN THE

Supreme Court of the United States

October Term, 1942.

No. 502

PHILADELPHIA COKE COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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October, 1942.

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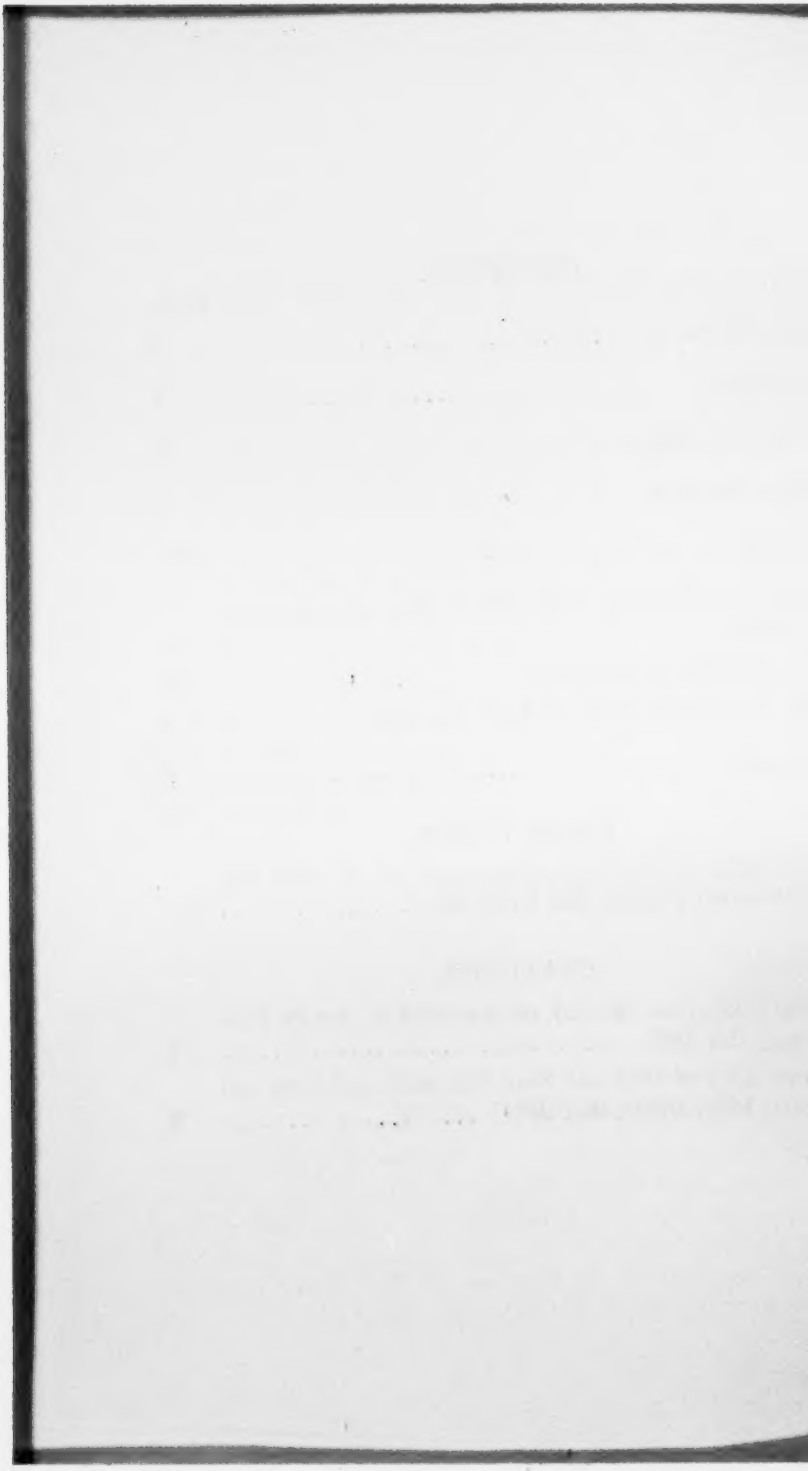

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Comes now the Philadelphia Coke Company, by counsel, and prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in the above case on July 29, 1942, reversing the decision of the United States Board of Tax Appeals.

OPINION BELOW.

The memorandum opinion of the Board of Tax Appeals (R. 20) in favor of the taxpayer is not officially reported, but may be found at ¶11,777-A, C. C. H. Board of Tax Appeals Decisions Service. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 23) is reported at 130 F. (2d) (Adv. Ops.) 87.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 29, 1942 (R. 29). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

This is a Federal income tax case for the years 1934 and 1936 and involves the determination of the correct amounts of deductions for amortization of a gas main, which determination depends upon whether the cost of a leasehold to the lessee is amortizable over "the first period", where the lease is for "three periods", with the right in the lessor to terminate the lease at the end of "the first period". The Board of Tax Appeals held in favor of the taxpayer on the basis of *Bonwit Teller & Co.* v. *Commissioner,* 53 F. (2d) 381 (C. C. A. 2), certiorari denied 284 U. S. 690. The Circuit Court of Appeals for the Third Circuit reversed the Board.

STATUTES INVOLVED.

Section 23(1) of the Revenue Acts of 1934 (48 Stat. 680, 689) and 1936 (49 Stat. 1648, 1660) provides that in computing net income there shall be allowed as a deduction:

> (1) Depreciation. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

STATEMENT.

The City of Philadelphia for a long period of years owned a plant for the manufacture of gas. Effective January 1, 1928, the City entered into an operating contract with the United Gas Improvement Company, leasing the gas works to United for an unlimited period with the right in the City or United to terminate the contract on December 31, 1937, or at the expiration of any ten-year period thereafter. Ter-

mination by the City was made to depend upon compliance by the City with certain conditions specified in the contract (R. 4-5).

The lease was assigned by United to The Philadelphia Gas Works Company, its wholly-owned subsidiary, with the approval of the City (R. 6).

In January, 1928, the assignee of the lease, The Philadelphia Gas Works Company, entered into a contract with Philadelphia Coke Company, petitioner herein, for the erection of a plant for the conversion of coal into coke, gas and other products, and the sale of the gas to the Gas Company. The contract between the Gas Company and Philadelphia Coke Company was for a stated period of 30 years. Its termination in the meantime, however, was dependent upon the termination of the contract between the City of Philadelphia and the Gas Company as assignee of United, that is, if the City should terminate its contract with the Gas Company at *the end of any one of the ten-year periods,* the contract between the Gas Company and Philadelphia Coke Company would automatically come to an end. The contract was also subject to the provision that the Gas Company's continuing to accept gas beyond December 31, 1937 (ten years from the date of the contract), was subject to any required approval of such continuance by the City Council of Philadelphia or any other public authority having jurisdiction in the premises (R. 6-7).

In January, 1929, a supplemental agreement was entered into between the Gas Company and Philadelphia Coke Company, whereby the latter contracted to and did erect a 20″ gas main, according to certain specifications, from the latter's plant to the plant of the Gas Company. The cost of this main was $692,985.27. The supplemental agreement provided that immediately upon completion of the main and acceptance by the Gas Company, title thereto should vest immediately in the Gas Company and that Philadelphia Coke Company should have no right, title or interest therein (R. 7, 8, 15).

The gas main was completed and put into service January 1, 1930. Thus the issue is: Should the cost of this gas main be amortized by the taxpayer over the period January 1, 1930, to December 31, 1937, when the lease could be terminated by the City or by the Gas Company, or should it be amortized over the period January 1, 1930, to December 31, 1957, as claimed by the Commissioner?

REASONS FOR GRANTING WRIT AND PETITIONER'S SUPPORTING BRIEF.

I.

Conflict of Decisions.

The opinion of the Circuit Court of Appeals for the Third Circuit is in conflict with the opinion of the United States Circuit Court of Appeals for the Second Circuit in *Bonwit Teller & Co.*, 53 F. (2d) 381, in which the Court held that where the lessee had a lease for years (nineteen years), containing an option giving the *lessee* the right to renew for an additional term of years (twenty-one years), the cost of the leasehold was to be amortized over the original term (nineteen years) rather than over the original term plus the renewal period (forty years altogether). In the present case, the lessee had a lease for thirty years with the right in the *lessor* to terminate the lease in ten years, that is, a vested right for only ten years.

If a taxpayer who has a term lease of nineteen years with the absolute right to extend the lease twenty-one years, a certainty of forty years, is entitled to amortize the lease over "the first period", as was held in the *Bonwit Teller* case, the taxpayer herein, with a lease for thirty years, with the absolute right in the *lessor* to terminate the lease at the end of ten years (thus giving the taxpayer no vested interest whatever beyond the first ten years), should be entitled to amortize the cost over "the first period." As was said by the Board in its opinion in the instant case (R. 21):

"The petitioner's contention is supported by the authorities and must be sustained. In 1934 and 1936 there was no knowing whether the duration of the Gas Company's contract would end December 31, 1937, by the exercise of the City's right to terminate, or would carry on. The petitioner's only assurance was that its supply contract would carry on through 1937. The knowledge and the uncertainty of the taxable years are the governing factors of depreciation deductions of these years, *1620 Broadway Corporation,* 36 B. T. A. 149, and not the later occurrences or possibilities, *Bonwit Teller & Co.* v. *Commissioner,* 53 Fed. (2d) 381, cer-denied 284 U. S. 690."

II

Important Federal Law Question.

The point decided by the United States Circuit Court of Appeals for the Third Circuit involves an important question of Federal law in that, with excess profits taxes running as high as 90 per cent, it is important for lessees to know the exact year in which deductions are to be allowed. Many lessees would be irreparably injured should they be misled as to how to amortize the cost of leaseholds.

CONCLUSION.

WHEREFORE, it is respectfully prayed that this petition be granted.

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